IN THE

Supreme Court of the United States

October Term, 1963

No. [redacted] 42

MORTIMER SINGER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Mortimer Singer, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above case on January 6, 1964.

Opinion Below.

There was no opinion in the District Court. The opinion of the Court of Appeals for the Ninth Circuit was filed on January 6, 1964, has not yet been reported, and is appended hereto at Appendix A., pp. 1 to 6. The judgment of said Court of Appeals is appended hereto and marked Appendix B, p. 7.

Jurisdiction.

The judgment of the Court of Appeals was entered on January 6, 1964 (*infra*, Appendix B, p. 7). A petition for rehearing was denied on February 10, 1964 (*infra*, Appendix C, p. 8). The jurisdiction of this Court is invoked under provisions of 28 U. S. C., Section 1254(1).

Questions Presented.

1. May the United States of America constitutionally compel the defendant in a felony case to be tried by a jury against his will and against the will of his counsel when the trial judge has expressed his approval of their valid waiver of a jury trial, but the Government refused to consent thereto?

2. Is Rule 23(a) of the Federal Rules of Criminal Procedure constitutionally valid insofar as it limits the right of the defendant to waive a jury trial by requiring the consent of the Government thereto?

3. Did the failure of the trial court to charge the jury on the elements of the offense charged, combined with the other errors in its charge to the jury, constitute a violation of the due process clause of the United States Constitution so that petitioner was denied a fair trial?

4. Did the improper and prejudicial statements and arguments made by the prosecutor constitute a violation of the due process clause of the Constitution so that petitioner was denied a fair trial?

5. Did the Circuit Court err in failing to apply Rule 52(b) of the Federal Rules of Criminal Procedure in order to correct the manifest and seriously prejudicial errors which occurred at the trial even though they were not called to the attention of the trial court?

Constitutional Provisions, Statutes, and Rules of Court Involved.

The constitutional provisions, statutes, and Rules of Court Involved are set out in Appendix D, at pp. 9-10.

Statement of the Case.

Petitioner, Mortimer Singer, was tried and convicted by a jury in the United States District Court, Southern District of California, on twenty-nine counts of an indictment charging thirty separate violations of the Mail Fraud Statute, 18 U. S. C. Section 1341 (Appendix D, p. 11).

Counts One to Seventeen of the indictment charged "depositing" of mail in violation of Title 18 U. S. C Section 1341, and Counts Eighteen to Thirty charged "receiving" mail in violation of the same statute. The first count of the indictment set forth the nature of the alleged scheme and the remaining counts incorporated the details thereof by reference to Count One. The indictment charged that beginning on or about July 1, 1957 and continuing to on or about March 15, 1959 appellant devised a scheme to defraud and obtain money and property from amateur song writers, lyric writers, and composers, by means of false and fraudulent pretenses, representations and promises. The indictment further alleged that petitioner falsely represented himself as the operator of a legitimate and well established song servicing and marketing business which could, and did, for a service charge, have songs, lyrics, and other musical compositions arranged, orchestrated, edited, published, recorded and exploited for the benefit of amateur song writers.

At the outset of the case, petitioner attempted to waive trial by jury [Opinion of Court below, App. A, p.

2; R. T. Vol. A, p. 11, lines 18-22]. The trial court was willing to approve the waiver [R. T. Vol. A, p. 11, line 23, to p. 12, line 5]. However, the government refused to consent and petitioner was compelled to be tried by a jury against his will [R. T. Vol. A, p. 19, lines 19-21].

Thereafter, in the course of the trial, the Government in its opening statement to the jury improperly presented and detailed other alleged offenses not mentioned in the indictment and made improper arguments which prejudiced the jury. For example, the Government referred to and elaborated upon other alleged offenses involving unrelated persons and entities, namely, James Carlyle Berg, Melody Masters, or Royal Melody Masters, Thomas and Berg Company, and Winston Publishing Company [R. T. p. 22; line 17, to p. 24, line 4]. None of these persons or entities was involved in this case and no evidence concerning them or petitioner's connection with them, if any, was submitted in this case. However, the effect of describing other alleged criminal offenses that were not included in the indictment and were not proved, was highly prejudicial to the petitioner, and designed to cause the jury to believe or infer that the petitioner was involved in many more criminal offenses.

Furthermore, the Government in its opening statement to the jury persisted in making improper arguments and presenting lengthy details as to alleged facts and evidence and witnesses to be used, as well as at-

tempting to instruct the jury on the law, all of which were highly improper and prejudicial [R. T. pp. 10-24 incl.]. Then, the Government persisted in asking improper leading questions and making improper, misleading and prejudicial remarks during the trial (see *infra*). In its closing argument to the jury, the Government argued that a certain partnership agreement constituted a "forgery" [R. T. Vol. B, p. 35, line 9]. There was no legal proof for such a charge [R. T. line 22, to p. 287, line 10]. The Government also persisted in arguing its own meaning of the words "made available" in its closing argument [R. T. Vol. B, p. 10, lines 5-15], despite the fact that the court had ruled during the trial that there was no ambiguity in the agreement requiring interpretation [R. T. p. 233, lines 4 and 5].

The damaging effect of the government's prejudicial misconduct at the trial was further aggravated by the errors of the trial court. The most serious error of the trial court consisted of its failure to give proper instructions to the jury, particularly in failing to define or set forth the necessary elements of the offense charged. The trial court failed to outline all of the separate elements necessary to constitute fraud in connection with the offense charged although the court had stated in chambers that it would do so [R. T. p. 48, line 2, to p. 50, line 2].

The trial court also gave misleading and erroneous instructions concerning circumstantial evidence [R. T.

p. 946, lines 8-10], presumption of innocence [R. T. 951, line 23, to p. 252, line 4], impeachment of a witness who gives false testimony [R. T. p. 944, lines 11-21], and reasonable doubt [R. T. p. 952, lines 9-20]. All of these errors were brought to the attention of the Court of Appeals but that Court refused to consider them because of Rule 30 of the Federal Rules of Criminal Procedure (App. D, p. 10). However, the application of Rule 52(b) of the Federal Rules of Criminal Procedure (App. D, p. 11) was brought to the attention of the Court of Appeals but said Court did not give any consideration to Rule 52(b) or even mention its applicability.

REASONS FOR GRANTING THE WRIT.

I.

Petitioner Was Deprived of His Constitutional and Fundamental Right to Waive a Jury Trial.

First and foremost, petitioner wishes to emphasize that his claim raises a serious and far-reaching constitutional question, which ought to be but never has been decided by this Court. Petitioner claims that his fundamental right to demand a jury trial in a criminal case includes the right to refuse a jury trial and that this basic right can not be abridged by making it dependent upon the consent of the government, for the following reasons:

(1) Historically and at the Time of the Adoption of the Constitution, the Right of a Defendant to Waive a Jury Trial Was Recognized.

It has been established and recognized in the federal courts that a defendant in a criminal proceeding may waive his constitutional right to a trial by jury. *Patton v. United States* (1930), 281 U. S. 276, 50 S. Ct. 253, 74 L. Ed. 854, 70 A. L. R. 263. Furthermore, the defendant has the right to try his own case without a jury even without the benefit of counsel, *Adams v. United States ex rel. McCann,* 317 U. S. 269, 63 S. Ct. 236, 87 L. Ed. 268, 143 A. L. R. 435.

The question here presented is whether the constitutional rights of the petitioner were violated when his request to waive a jury trial was denied because the government refused to consent to such waiver.

It is important to note that at early English common law the accused could refuse a jury trial even though the government sought to compel him to submit

to a jury trial by using various means, including torture. Later development of the jury system was such that it became a protection of the accused against government oppression and thus the accused's right to a jury trial was adopted in our Constitution, because of the benefits to the accused.

The case of *Patton v. United States*, 281 U. S. 276, clearly recognizes the right of an accused to waive a trial by jury and comprehensively disposes of all the arguments used against such waiver. The court states as follows at page 298: *"Upon this view of the constitutional provisions we conclude that Article III, Section 2, is not jurisdictional, but was meant to confer a right upon the accused which he may forego at his election. To deny his power to do so, is to convert a privilege into an imperative requirement* (Emphasis added).

In the *Patton* case, the court cites with approval the references in the brief of government counsel showing that waiver of trial by jury, even in trials for serious offenses, was permitted in Colonial times and at the time of the adoption of the Constitution, *Patton v. United States*, 281 U. S. 276 at pages 281-282 at page 297, the court further states, as follows: ". . . *it is reasonable to conclude that the framers of the constitution simply were intent upon preserving the right of trial by jury primarily for the protection of the accused*" (Emphasis added).

Amendment VI of the United States Constitution provides, in part, as follows: ". . . *the accused shall enjoy the right to . . . trial by an impartial jury . . .*"

In construing the Constitution and particularly the Bill of Rights, it must be remembered that they were designed to protect the rights of the people and did not create these rights. They are based upon the concept that the people are endowed with certain inalienable rights which include the rights to ". . . *life, liberty, and the pursuit of happiness* . . ." [*Declaration of Independence*] and that these rights existed before the Constitution was written.

This Court has held that there is ". . . *nothing in the Constitution to prevent an accused from choosing to have his fate tried before a judge without a jury, even though, in deciding what is best for himself, he follows the guidance of his own wisdom and not that of a lawyer*", *Adams v. United States ex rel. McCann*, 317 U. S. 269, 275, 63 S. Ct. 236, 87 L. Ed. 268 (1942).

Unfortunately, the well-reasoned opinion of the court in the *Patton* case, *supra*, becomes confused by the *obiter dicta* at the end thereof, where the court added gratuitously that the approval of the court and the consent of the government counsel would be required. We respectfully submit that this latter portion of the opinion is without any legal or historical basis and is inconsistent with the rest of the opinion. It appears to be an afterthought without supporting authority. What good is the accused's right to waive a jury trial if the government counsel, who is doing his utmost to convict the accused, can thwart the efforts of the accused and his counsel? Does this not "convert a privilege of the accused into an imperative requirement" which the court had stated could not be done?

The whole purpose of these constitutional provisions is to protect the accused, particularly against oppression

by the government. It is therefore arbitrary, unreasonable, and a deprivation of his constitutional rights to compel him to have a jury trial against his wishes, just because the government insists upon it. As the court, through Justice Frankfurter, stated in *Adams v. United States ex rel. McCann*, 317 U. S. 269, at page 279: *"What were contrived as protection for the accused should not be turned into fetters"* (Emphasis added).

(2) The Right of an Accused in a Criminal Case to Demand a Jury Trial Necessarily Includes the Right to Refuse a Jury Trial.

As we have heretofore shown, historically this right to waive a jury trial was recognized, and logically in drawing the Constitution there was no more need or reason to add words recognizing the right to waive a jury than it was necessary to add such words of waiver to any other constitutional right. The right to demand necessarily implies the right to refuse, *People v. Spegal* (Ill. Sup. Ct. 1955), 5 Ill. 2d 211, 218; *People v. Fisher*, 340 Ill. 250, 257, 172 N. E. 722 (1930). As the court stated in *People v. Spegal*, 5 Ill. 2d 211 at p. 218, *"The power to waive follows the existence of the right, and there is no necessity of guaranteeing the right to waive a jury trial"*. Also, this is the view in the *Patton* case expressed as follows: *"To deny his power to do so, is to convert a privilege into an imperative requirement."* *Patton v. United States*, 281 U. S. 276, 298.

(3) Since a Defendant Can Plead Guilty and Waive Any Trial Whatever Without the Consent of the Government, He Must Necessarily Have the Right to Waive a Trial by Jury Without Government Consent.

This proposition is supported by *State ex rel. Warner v. Baer* (1921), 103 Ohio St. 585, 589, which is cited with approval in *Patton v. United States,* 281 U. S. 276 at p. 291. Many courts have recognized the constitutional right of an accused to waive a trial by jury.

Munsell v. People, 122 Colo. 420, 222 P. 2d 615;

State v. Hernandez, 46 N. M. 134, 123 P. 2d 387;

State v. Harvey, 117 Oregon 466, 242 Pac. 440, 444;

Commonwealth v. Petrillo, 340 Pa. 33, 16 A. 2d 50;

People v. Scuderi (1936), 363 Ill. 84, 1 N. E. 2d 225, 227;

State v. Zebrocki (1935), 194 Minn. 346, 260 N. W. 507, 508;

State ex rel. Warner v. Baer, 103 Ohio State 585, 612 (1921).

(4) Since a Defendant Can Waive Other Important Constitutional Rights Without the Consent of the Government, He Must Necessarily Have the Right to Waive a Jury Trial Without Government Consent.

It has been held that the defendant may waive other important constitutional provisions such as confrontation of witnesses and assistance of counsel without Government consent. Accordingly, there is no valid basis for restricting the defendant's right to waive a

jury trial since the power to waive follows the existence of the right itself, *People v. Spegal* (Ill. Sup. Ct. 1955), 5 Ill. 2d 211, 218, 125 N. E. 2d 468, 51 A. L. R. 2d 1337.

It has been held that there is "*nothing in the Constitution to prevent an accused from choosing to have his fate tried before a judge without a jury . . .*," *Adams v. United States ex rel. McCann*, 317 U. S. 269, 275, 63 S. Ct. 236, 87 L. Ed. 268 (1942); *Naples v. United States*, 307 F. 2d 618, 625, 626 (D. C. 1962).

(5). The Constitutional Provisions in Respect to Jury Trials Are for the Protection of the Interests of the Accused and Not the Government; There Is Nothing in the Constitution Giving the Government the Right to Demand a Jury Trial.

As the court states in the *Patton* case, ". . . it is reasonable to conclude that the framers of the Constitution simply were intent upon preserving the right of trial by jury primarily for the protection of the accused", *Patton v. United States*, 281 U. S. 276 at p. 297. It is also stated that, "The right to trial by jury was uniformly regarded as a valuable privilege bestowed upon a person accused of crime for the purpose of safeguarding him against the oppressive power of the King and the arbitrary or partial judgment of the court", *Patton v. United States*, 281 U. S. 276, 296.

Thus, to require the consent of the Government before defendant can waive a jury trial in effect destroys the defendant's right and gives the Government a right to demand a jury trial. This has been held in the

case of *People v. Spegal,* 5 Ill. 2d 211, where the court states at page 218, as follows:

> ". . . that the prosecution's consent is necessary to make such a waiver effective is inconsistent with the defendant's acknowledged power, enables the state to nullify his act and reduces his power to waive a jury trial to a shadow . . . The power to waive follows the existence of the right and there is no necessity of guaranteeing the right to waive a jury trial."

The case of *People v. Spegal (supra)* overrules *People v. Scornavache,* 347 Ill. 403, which was contrary. A sharp criticism of the *Scornavache* case and arguments for the unfettered right of an accused to waive a jury trial are set forth in an article by Jerome Hall in *18 Am Bar. Assn. Journal, 226* entitled *"Has the State a Right to Trial by Jury in Criminal Cases."*

Furthermore, it has been held in the Federal Court that were right to a jury trial exists in petty offenses, the consent of the Government is not necessary to effect a waiver: *United States v. Au Young* (1946), 142 Fed. Supp. 666. There is all the more reason to recognize the defendant's right to waive a jury trial in more serious offenses.

We respectfully submit that any attempt to give a right, directly or indirectly, to the Government to demand a jury trial in a criminal case, would be in violation of petitioner's rights under *Amendments 9 and 10 of the Constitution,* (App. D, pp. 9-10). In construing and applying *Amendment 9* to this case, the fact that the framers of the Constitution did not deem it necessary to state that an accused could also waive

his right to a jury, would not disparage such right. Every accused had an inalienable right to demand or refuse trial by jury before the adoption of the Constitution. Therefore, the failure to specify such right does not abrogate such right. Also *Amendment 10* specifies that all rights were reserved to the people except such as were specifically delegated to the United States or to the States. Thus, it is clear that the Government has no right to demand a jury trial in a criminal case or to deprive petitioner of his right to waive a jury trial.

(6) The Defendant Has a Right to Safeguard Himself Against Oppression or Partiality of a Jury and to Decide What Is Best for Himself.

It has been recognized that there are occasions when a jury might be influenced by passion, prejudice, or public feeling, or lack sufficient knowledge, experience or insight to give the defendant a fair trial. Often, the subject matter may be too technical or too involved for a jury. This has been aptly expressed as follows:

> "Clearly this right is for the benefit of the accused. If he regards it in the particular case as a burden, a hardship, a prejudice to a fair trial, why in the name of reason should he not be permitted to waive it and submit his cause to the magistrate. The local atmosphere with which the jurors are more or less impregnated may not in his judgment have reached the magistrate. He may have the highest confidence in his sense of fairness and justice in determining the facts of his cause, and *what was given to him generally, as a shield, should not be used as a sword* in case he feels that a jury

trial in such case would so result." *Hoffman v. State,* 98 Ohio St. 137, 146-147 (1918). (Emphasis added.)

The right of the defendant is further expressed in the following opinion:

> "The right of an accused person to a jury trial is absolute to the extent that he may have such a trial by claiming it or even by withholding his consent to proceed without it. The State owes to a person charged with a crime a fair and impartial trial, including a strict compliance with every constitutional guaranty, *but it is not obliged to force upon him the acceptance of rights and privileges in the face of his desire, informed and expressed, to waive them.*" *People v. Fisher,* 340 Ill. 250, 257, 172 N. E. 722 (1930). (Emphasis added.)

The basic question is, should not the defendant have the right to make the ultimate decision as to demand or waiver of a jury trial. This view is held by Justice Frankfurter who stated the following in *Adams v. United States ex rel., McCann,* 317 U. S. 269, 63 S. Ct. 236 at p. 241: *"And since trial by jury confers burdens as well as benefits, an accused should be permitted to forego its privileges when his competent judgment counsels him that his interests are safer in the keeping of the judge than of the jury"*, and at page 242, the court goes on to state: *"What were contrived as protections for the accused should not be turned into fetters."* In that case, the defendant did not even have counsel when he waived the jury. Certainly, this principle would apply all the more where the accused through capable counsel requests a waiver of jury trial.

(7) To Compel a Defendant in a Criminal Case to Undergo a Jury Trial Against His Will Is Contrary to His Rights to a Fair Trial and the Provisions of the Constitution.

The Fifth Amendment to the Constitution provides, in part, as follows: (App. D, p. 9):

> "No person . . . *shall be deprived of life, liberty, or property, without due process of law.*"

It is our contention that where the defendant is compelled to undergo a jury trial against his will and against the will of his counsel, when the trial judge has expressed his approval of their decision to waive a jury trial, and only because the government refused to consent thereto, there is a violation of the "due process clause" of the Fifth Amendment as well as of other constitutional provisions.

This provision protects the right of a defendant to a fair hearing, *Wong Yang Sung v. McGrath,* 339 U. S. 33, 50. It supplements the procedural guarantees in the Sixth Amendment and in the preceding clauses of the Fifth Amendment for the protection of persons accused of crime, *Constitution of the United States, Senate Document* No. 170 (1953 Ed.), p. 847.

The case of *Gideon v. Wainwright,* 372 U. S. 335, 339, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), emphasizes that, ". . . due process is a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights," and that the due process clause relates to the concept of the accused having a fair trial and the protection of the fundamental rights of an accused. It is further held that due process, ". . . in *safeguarding the liberty of the citizen against deprivation through the action*

of the State, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions." Mooney v. Holohan, 294 U. S. 103, 112 (emphasis added).

Therefore, in applying the test of due process to this case, we submit that since the petitioner had a right to waive a jury trial, it became a mockery to make this right dependent upon the consent of the government, and his constitutional rights were thereby violated.

II.

Rule 23(a) of the Federal Rules of Criminal Procedure Is Constitutionally Invalid Particularly Insofar as It Limits the Right of the Defendant to Waive a Trial by Jury by Requiring the Consent of the Government Thereto.

The constitutionality of Rule 23(a) of the Federal Rules of Criminal Procedure (App. D, p. 10) is a matter of far-reaching importance and applies to practically all federal criminal cases. It involves serious and far-reaching constitutional questions which ought to be, but never have been decided by this Court.

Nowhere in the Constitution is the Government given the right to demand a jury trial in a criminal case. Yet by Rule 23(a) the Government, in effect, exercises the right to demand a jury trial and to compel the defendant to undergo a jury trial against his will. We can find no historical, legal or logical basis for giving the Government such a right. Since Rule 23(a) operates to abridge the defendant's right to waive a jury trial, it violates his constitutional rights under the Fifth, Sixth, Ninth and Tenth Amendments heretofore cited.

The learned opinion of the Court of Appeals in this case (App. A, p. 3) acknowledges that petitioner's "logic is not lacking some persuasive quality" in urging the unconstitutionality of Rule 23(a) against him. The admitted logic of appellant's position is then said to yield to "well settled" authority exemplified by three cited cases. Careful analysis of each of these cases discloses that none of them settles this highly important constitutional issue well, or at all. *Patton v. United States* (1930), 281 U. S. 276, the only decision of higher authority cited in the Court's learned opinion or by the government in support of Rule 23(a), was a case in which the government *stipulated* with the defense that a felony trial should continue with eleven instead of the original twelve jurors. The stipulated jury of eleven convicted the defendant, and the United States Supreme Court affirmed. As a matter of fact, the opinion in the *Patton* case comprehensively supports the arguments in favor of petitioner's right to waive a jury trial. The only portion adverse is the *obiter dicta* at the end of its opinion which cites no authority and has no valid basis and does not settle the issues before this Court.

Taylor v. United States (9th Cir. 1944), 142 F. 2d 808, cert. den., 323 U. S. 723, reh. den. 323 U. S. 813, the second authority cited by the Court in support of Rule 23(a) is another case in which the government stipulated with the defendant to continue trial with eleven jurors. The right of a defendant to waive the jury entirely, with the approval of the trial judge, over the government's objection was neither involved in the *Taylor* case, nor decided by it.

Mason v. United States (10th Cir. 1957), 250 F. 2d 704, the third and last decision cited in the learned opinion, was a case in which the trial *judge*, and not the prosecutor, insisted upon trial by jury, and refused to approve the defendant's election to be tried by the Court alone. The prosecutor's consent or refusal was never put in issue; the government's position in the matter is not even mentioned in the opinion; and, accordingly, the point with which we are concerned was in no wise involved or decided.

Thus, of the three cases cited by the learned Court in the case at bar, two involve a stipulation by prosecution and defense to a jury trial of eleven, and one involves a refusal by the trial *judge* to approve a non-jury trial. None of the three cases cited involves or decides that the government may constitutionally force (1) the defendant, (2) his counsel and (3) the trial court to bow in unison to the will, whim or motive, whatever it might be, of the prosecutor in choosing or waiving a jury, as was done here.

Writers on the law, who have considered the point, have denounced the Rule 23(a) requirement of consent by the prosecutor as procedurally unconstitutional:

> "While the rule requires the consent of the Government to a waiver of a jury trial, as far as the author is aware, the Government has ordinarily considered giving such consent a pro forma routine matter and has generally granted it as of course without discussion. Obviously the prosecution should be interested only in seeing that justice

is done and should have no interest in the choice of the mode of trial. A prosecuting attorney should not be a partisan advocate representing a client. He is an officer whose function is to assist in attaining a just result, whether it be a conviction or an acquittal. Many years ago an eminent Solicitor General of the United States observed that 'the Government always wins a case when justice is done to one of its citizens.'

"After all the right to trial by jury is a constitutional right of the defendant alone. It is intended to be a privilege of the accused. The prosecution has no constitutional right to a trial by jury, and the requirement that it give its consent to a waiver is a purely procedural rule and has always been regarded as such.

"The author urges that Rule 23(a) of the Federal Rules of Criminal Procedure be amended by striking out the requirement of a consent of the Government to a waiver of a jury trial."

"*A Criminal Case in the Federal Courts*" by *Alexander Holzoff*, cited in the West Publishing Co. edition of the *1960 Federal Rules of Criminal Procedure*, pp. 17-18.*

Another writer puts the matter this way:

"Author's Note to Rule 23: This [Rule 23(a)] appears to state the present law with respect to the right to trial by jury in criminal cases. I could never understand why a defendant should be required to secure the consent of the court and the

*The author is a United States District Judge for the District of Columbia and former Chairman of the Section of Judicial Administration of the American Bar Association.

prosecutor. The effect of this rule is that either the court or the prosecutor can force a jury on him when he does not want it. There is an argument in favor of the court where the death penalty is involved and the court prefers to be excused, but that is subject to debate. In cases involving public passions and prejudices a judge is in danger of an unpopular decision. All of these matters occur to me in considering the position of the judge, but where is the prosecutor entitled to a vote? He will insist on a jury when he believes that the prosecution will have an advantage. I never heard of the battle in which the prosecutor won the right to a jury trial."

Federal Rules of Criminal Procedure by Wm. Scott Stewart; copyright 1945; Publisher: The Flood Company, Chicago, Ill.

It is likewise significant that the Advisory Committee on Criminal Rules appointed by the Chief Justice of the United States pursuant to *Public Law 85-513; 72 Stat. 356; 28 N.S.C.A. 331,* enacted July 11, 1958, has been considering the very point at issue here.

The federal courts have the power as well as the duty to declare invalid federal rules of procedure which are unconstitutional and should do so in this case.

Rule 23(a) is also invalid on another ground. Although the Supreme Court has been given the power to prescribe rules of pleading, practice, and procedure, it has no power to change the *substantive rights* of a defendant, *Baker v. United States* (1944), 139 F. 2d 721 (C. C. A. 8th); *Mississippi Publishing Corp v.*

Murphree (1946), 326 U. S. 438; *United States v. Sherwood* (1940), 312 U. S. 584.

This principle is set forth in *Federal Criminal Practice Under the Federal Rules of Criminal Procedure,* by William M. Whitman at page 6, as follows:

> "However, the (Federal Rules of Criminal Procedure) govern practice and procedure only; the authority of the Supreme Court to prescribe rules of procedure does not empower the court by a procedural rule to deprive a person of a substantive right granted by law."

We respectfully submit that the right to waive a jury trial in a criminal case is a substantive right which can not be abridged by rule of court.

III.

Petitioner Was Denied a Fair Trial as Guaranteed Under the Fifth Amendment in That His Conviction Rests Upon Instructions to the Jury Which Were Incorrect, Prejudicial, and Misleading and in the Failure of the Jury to Receive Other Necessary and Proper Instructions.

The trial court stated in chambers that in charging the jury it would rely upon the elements of fraud set out in the cases of *Southern Development v. Silva,* 125 U. S. 247 and *Oppenheimer v. Clunie,* 142 Cal. 313, 318 [R. T. p. 48, line 2, to p. 50, line 2] and the trial court further stated in chambers as follows: "And while damage is not necessary in a criminal fraud the other elements are still necessary" [R. T. p. 50, lines 3 and 4]. However, the trial court in its instructions failed to give a complete definition of fraud. This was clearly error, *Bird v. U. S.,* 180 U. S. 356, 45 L. Ed.

570, 21 S. Ct. 403. It was basic and all important that the jury should know and understand all of the separate elements necessary to constitute fraud and evaluate each one in connection with the offenses charged. The court failed to outline to the jury the following elements required to prove fraud:

(a) That the defendant has made a representation in regard to a material fact.

(b) That such representation was false.

(c) That such representation was not actually believed by defendant on reasonable grounds to be true.

(d) That it was made with intent to be acted on.

(e) That the complainant relied on such representation.

(f) That in so acting, the complainant was ignorant of its falsity, and reasonably believed it to be true.

In instructing the jury on the weight and effect of circumstantial evidence in the case at bar, the court stated,

> *"If the circumstantial evidence measures up to all the foregoing requirements, it is the duty of the jury to return a verdict of guilty"* (Emphasis added). [R. T. p. 946, lines 8-10].

This was misleading and erroneous since not only the *circumstantial evidence* but *all of the evidence* must measure up to the requirements to show guilt beyond a reasonable doubt as well as meet the other requirements mentioned by the court [R. T. p. 946, lines 1-7]. *George v. Los Angeles R. Co.*, 126 Cal. 357, 58 Pac. 819. It is reversible error to instruct the jury that it is their duty to bring in a verdict of guilty. It was further erroneous to give circumstantial evidence more weight

or even the same weight as direct evidence, *53 Am. Jur. 572; State v. Alliance,* 330 Mo. 773, 51 S. W. 2d 51, 85 A. L. R. 471.

The Court's instruction concerning the impeachment of a witness who gives false testimony, that *all* of the testimony of such a witness *must* be rejected when he has testified falsely [R. T. p. 944, lines 11-21] is erroneous since the rule still permits a juror to *accept* other testimony of a witness who has wilfully sworn falsely regarding a material fact, if, in spite of merited suspicion on the part of the juror, *he still believes* the balance of the testimony to be true, *People v. Kennedy* (1937), 21 Cal. App. 2d 185, 201, 69 P. 2d 224. It has been held that it would be an invasion of the province of the jury to instruct them that they "must" or "should" disregard the testimony of a witness testifying falsely, *53 Am. Jur. 583, note 1; Com. v. Ieradi,* 216 Pa. 87, 64 Atl. 889.

The defendant is entitled to an instruction defining the law applicable to his theory of the case covering his defense, if there is any competent evidence reasonably tending to substantiate that theory, *53 Am. Jur. 501, note 7; Little v. U. S.* (C. C. A. 10th), 73 F. 2d 861, 867; *People v. Dole,* 122 Cal. 486, 55 Pac. 581.

Honest belief in the representations being made is a good defense, *Rudd v. U. S.* (C. C. A. 6th), 173 Fed. 912.

We respectfully submit that the foregoing constituted a violation of petitioner's constitutional rights under the due process clause of Amendment 5.

IV.

Petitioner Was Denied a Fair Trial as Guaranteed by the Constitution by Reason of the Improper and Prejudicial Statements, Arguments and Conduct of the Government.

It is reversible error for the prosecutor in his opening statement to refer to incompetent or irrelevant matters especially if they are prejudicial. *State v. Peters,* 82 R. I. 292, 107 A. 2d 428, 48 A. L. R. 2d 999; *People v. Fleming,* 166 Cal. 357, 379, 136 Pac. 291.

The Government's attorney in his opening statement referred to other alleged offenses involving other persons and entities to wit, James Carlyle Berg, Melody Masters or Royal Melody Masters, Thomas and Berg Company, and Winston Publishing Company [R. T. p. 22, line 17, to p. 24, line 4]. None of these persons or entities was involved in this case and no evidence concerning them or the appellant's connection with them was submitted in this case. However, the effect of setting forth other alleged criminal offenses that were not included in the indictment and were not proved, was highly prejudicial to the appellant and caused the jury to believe that the appellant was involved in many more criminal offenses.

Furthermore, the prosecutor in his opening statement to the jury persisted in making improper arguments and presenting lengthy details as to alleged facts and evidence and witnesses to be used as well as attempting to instruct the jury on the law, all of which were highly improper and prejudicial [R. T. pp. 10-24 incl.].

It has been held that it is improper to use the opening statement to embody or convey proof by means of unsworn facts or to argue facts or to discuss the

law of the case, *53 Am. Jur. 358; Scripps v. Reilly,* 35 Mich. 371; *Wells v. Ann Arbor R. Co.,* 184 Mich. 1, 150 N. W. 340.

During the course of the trial, the government's attorney persisted in asking improper questions and making statements which were improper, misleading and prejudicial so that defendant was deprived of a fair trial.

The standard of conduct and the duties imposed upon the prosecutor in a criminal case are set forth in *Viereck v. U. S.,* 318 U. S. 236, 63 S. Ct. 561, 566 (1943) where the court held that the appeal to passion and prejudice by the prosecuting attorney in his closing argument was ". . . offensive to the dignity and good order with which all proceedings in court should be conducted" (p. 566). The court goes on to state the rule as follows at page 566:

> "We think that the trial judge should have stopped counsel's discourse without waiting for an objection. The United States attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest therefore, in a criminal prosecution is not that it shall win a case but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods

> calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one! *Berger v. United States*, 295 U. S. 78, 88, 55 S. Ct. 629, 633, 79 L. Ed. 314. Compare New York Central R. Co. v. Johnson, 279 U.S. 310, 316, 318, 49 S. Ct. 300, 302, 303, 73 L. Ed. 706."

It has been held that it is improper and prejudicial for the prosecutor to ask a question to which he expects a negative answer and then fail to offer evidence in support of his contention, *People v. Perez*, 23 Cal. Rptr. 569, 574, 575, 373 P. 2d 617 where the court states at page 575:

> "The jury have a right to believe that the District Attorney is in good faith and probably had a hidden source of information."

It is improper and prejudicial for the prosecutor to make statements of alleged fact in the guise of questions propounded to witnesses; *Berger v. U. S.*, 295 U. S. 78, 79 L. Ed. 1314, 55 S. Ct. 629.

The conduct of the prosecuting attorney provoked the trial court to state the following:

> "The Court: I have warned the jury to disregard it. Counsel doesn't know the rules of evidence. I think between now and the next case he ought to do a little homework and learn the rules of evidence in criminal cases. I am sincere, and I think it is my duty to warn the jury, because you are doing a lot of things that shouldn't be done by a prosecutor. You make statements of what you intend to prove when I have sustained the objection, which is wrong" [R. T. p. 566, line 21, to p. 567, line 16].

In his closing argument to the jury the government's attorney made improper and prejudicial remarks. He argued that one of the documents was a "forgery" and he argued to the jury, "That isn't so, that is a forgery" [R. T. Vol. B, p. 35, line 9]. There was no legal proof for such a charge [R. T. p. 284, line 22, to p. 287, line 10]. This remark was highly prejudicial and improper and constituted reversible error, *Viereck v. United States,* 318 U. S. 236, 63 S. Ct. 561, 566.

The prosecutor continued his tactic of trying to read into the oral and written evidence his own terms and conditions, interpretations, meanings, and innuendoes, and to have the jury infer wrongful and sinister meanings in every word and act [R. T. Vol. B, p. 10, lines 5-15; p. 16, lines 17-25; p. 18, lines 8 and 9, 23; p. 19, lines 4-7; p. 20, lines 3-7; p. 21, lines 16-19; p. 22, lines 17 and 18; p. 27, lines 11 and 12, 16-20]. Likewise, the prosecutor persisted in arguing matters which had been ruled out by the court, all of which were highly prejudicial and which necessarily influenced the jury. Another example is shown where the prosecutor argues that appellant had an interest in Eagle Pass Music Publications despite the fact that the entire ownership was shown to be otherwise [R. T. p. 266, lines 1-22; p. 278, lines 11-16; p. 562, line 13, to p. 563, line 13].

The prosecutor in his opening argument to the jury also referred to matters not in evidence and to some which were specifically disallowed by the court [R. T. Vol. B, p. 9, lines 16-19]. This was highly improper *Scripps v. Reilly,* 35 Mich. 371, 387; *Wells v. Ann Arbor R. Co.,* 184 Mich. 1, 150 N. W. 340, 344. Again, the prosecutor improperly argues that the jury *must*

draw certain inferences which he wanted them to draw [R. T. Vol. B, p. 30, line 8].

We respectfully submit that the prejudicial misconduct of the Government's attorney was such as to constitute a violation of due process and of petitioner's right to a fair trial.

V.

The Learned Court Below Erred in Failing to Apply Rule 52(b) of the Federal Rules of Criminal Procedure in Order to Correct the Manifest and Seriously Prejudicial Errors Which Occurred at the Trial Even Though They Were Not Called to the Attention of the Trial Court.

The pitfalls, perils and dangers of trying any case before a jury are well-known to every trial lawyer, judge and justice. Trial by jury differs not merely in degree but in kind from trial by the court alone.

> "The less rigorous enforcement of the rules of evidence, the greater informality in trial procedure —these are not the only advantages that the absence of a jury may afford to a layman who prefers to make his own defense. In a variety of subtle ways trial by jury may be restrictive of a layman's opportunities to present his case as freely as he wishes. And since trial by jury confers burdens as well as benefits, an accused should be permitted to forego its privileges when his competent judgment counsels him that his interests are safer in the keeping of the judge than of the jury." *Adams v. United States ex rel., McCann* (1942). 317 U. S. 269, 278.

The petitioner here and his trial counsel, with the approval of the trial judge, chose a court trial; but the

prosecutor decided that the case should be tried before a jury. To say the least, this unconstitutional arrogation of power by the prosecutor carried with it a high and grave duty of scrupulous regard on his part for the niceties of procedural fair play. Since nobody but the prosecutor wanted the jury, his was the solemn burden of insuring that he did not abuse the privilege which he had wrested from the petitioner, and his counsel, of choosing the trier of fact.

The opinion of the court below refers to "situations where government counsel may have been guilty of improper examination or argument in the presence of the jury," as well as "numerous examples of alleged misconduct on the part of government counsel" and "alleged failure by the court to give adequate instructions on the elements of criminal fraud." However, the response of the court below to these specifications of obvious prejudicial error, which cannot be made to disappear simply by denying their existence, is that 1) the petitioner failed to make timely objections, and 2) that the jury was duly admonished.

However, the need to make timely, pointed, legally sound and valid objections to prejudicial misconduct before the jury was thrust upon the petitioner against his will by the prosecutor himself. The petitioner did not ask for the jury and he did not invite or commit the prejudicial error with which the record abounds. Having forced the jury upon the petitioner, the prosecution then indulges in an opening recitation of other alleged offenses which were entirely extraneous and unproven, accused the petitioner in his closing argument of "forgery" with which he was not charged and which was unproven, admittedly failed to present an adequate

instruction on mail fraud to the trial judge who accordingly did not define for the jury the elements of the crime, and generally played upon the passions and prejudices of the jury. Now the prosecution sits back after the petitioner has been convicted and challenges him to pin-point a technically sound and timely objection to each and every error, or succumb. This is exactly the contest which the petitioner sought to avoid by waiving a jury; this is exactly what the prosecution had no constitutional right to impose upon the petitioner; this is a classical denial of due process.

The second response to petitioner's specifications of prejudicial error is that the trial judge duly admonished the jury. Aside from the point that petitioner constitutionally attempted, with the approval of the trial judge, to avoid a trial by jury, where admonitions would not be at all necessary, it is crystal clear that judicial admonitions are no match for the subtle and hidden but immensely powerful forces of mass psychology. These forces can no more be controlled by admonitions than could the sea by King Canute. These forces were called into play, and played upon with error, by the prosecution over the constitutional objection of the defense. This was a denial of due process beyond the corrective reach of any admonition.

The learned court below failed to consider the application of Rule 52(b) of the Federal Rules of Criminal Procedure which provides that "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court" (App. D, p. 11).

It has been held that prejudicial statements made by the prosecuting attorney in his argument to the jury

constitute reversible error even though no objection was made at the trial, *Brown v. United States* (9th Cir. 1963), 314 F. 2d 293; *Ginsberg v. United States* (5th Cir. 1958), 257 F. 2d 950; *Wagner v. United States* (5th Cir. 1959), 263 F. 2d 877. Likewise, errors in instructions will be noticed even though no objection was made at the trial, *United States v. Raub* (7th Cir. 1949), 177 F. 2d 312, *Herzog v. United States* (9th Cir. 1956), 235 F. 2d 664.

None of these authorities is mentioned in the opinion of the court below and there is no discussion whatsoever of Rule 52(b) by the court below.

The court below merely referred to the absence of objections by the petitioner as a ground for denying him relief on appeal, citing Rule 30 and the 1955 *Brown* case.*

In view of the foregoing, it would appear that there is a conflict between the decision of the Court of Appeals in the case at bar and those decisions of other circuit courts cited above, including prior decisions of said Ninth Circuit Court itself concerning the application of Rule 52(b). However, the cases cited by petitioner which invoke Rule 52(b) clearly entitle him at the very least to a careful consideration of its applicable effect here. Thus, in *Herzog v. United States* (9th Cir. 1956), 235 F. 2d 664 at 666 this court said:

> "Criminal Rule 30 by its terms precludes *a party* from assigning as error the giving of an instruction to which he has not objected on the trial. Rule

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*The case of *Brown v. United States* (9th Cir. 1955), 222 F. 2d 293 cited in the Court's opinion is a different case from *Brown v. United States* (9th Cir. 1963), 314 F. 2d 293 cited by petitioner.

52(b), appearing under the caption 'General Provisions,' is not directed to the party, but is a grant of authority to the court itself. These rules are not conflicting. Rather, they complement each other. Rule 52(b) was doubtless designed to take care of unusual or extraordinary situations where, to prevent a miscarriage of justice or to preserve the integrity of judicial proceedings, the courts are broadly empowered to notice error of their own motion. The Rule is in the nature of an anchor to windward. It is a species of safety provision the precise scope of which was left undefined. Its application to any given situation must in the final analysis be left to the good sense and experience of the judges.

"Subsequent to the adoption of the criminal rules many of the circuits have noticed asserted error in instructions not objected to below. See cases cited in the footnote."

In *United States v. Raub* (7th Cir. 1949), 177 F. 2d 312, where a conviction for income tax evasion was reversed for improper instructions, the Court of Appeals said at page 315:

"It appears to be generally established now that —Rule 30 notwithstanding, in criminal cases involving life or liberty of a defendant, an appellate court may notice plain and seriously prejudicial error in the instructions, even though it was not called to the attention of the trial court."

In *Ginsberg v. United States* (5th Cir. 1958), 257 F. 2d 950 at page 955 the court stated:

". . . authority is not wanting for enforcement of the fundamental rules of fairness even when no exception is taken to the argument.

> "We hold that this statement of the prosecuting attorney constituted 'plain errors . . . affecting substantial rights' under Rule 52(b), 18 U.S.C.A., governing criminal procedure. It was such an error, also, as would have been magnified in its influence on the jury by an objection and motion for mistrial. It made it so unlikely that the petitioner could be given a fair trial, as the term is understood in our jurisprudence, that we hold it to be reversible error."

Petitioner respectfully and sincerely urges that under all of the circumstances it was reversible error for the court below to disregard and to fail to apply Rule 52(b) of the Federal Rules of Criminal Procedure and that, in any event, there is a conflict in the decision of the court below concerning Rule 52(b) with the decisions of the fifth circuit and seventh circuit as well as the ninth circuit court itself, which should be resolved by this court.

Conclusion.

For the foregoing reasons, it appears that the petitioner was deprived of his constitutional right to waive a jury trial, that under all of the circumstances he did not have a fair trial and that he was thereby deprived of his constitutional rights therein. It further appears that the validity and constitutionality of Rule 23(a) and the interpretation and application of Rule 52(b) of the Federal Rules of Criminal Procedure have not been but should be settled by this Court. It further appears that the Court of Appeals for the Ninth Circuit has rendered a decision in conflict with the decisions of other Courts of Appeal as well as in conflict with its own prior decisions.

In view of the importance of the constitutional questions to be decided, including the basic constitutional right of a defendant to waive a jury trial particularly with reference to all federal felony cases, it is respectfully submitted that the writ of certiorari sought herein should be granted.

Respectfully submitted,

SIDNEY DORFMAN,

Attorney for Petitioner.

APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Mortimer Singer, Appellant, vs. United States of America, Respondent. No. 18,284.

Jan. 6, 1964.

On appeal from the United States District Court for the Southern District of California, Central Division.

Before: Barnes and Merrill, Circuit Judges; and Burke, District Judge.

Burke, District Judge:

Appellant, Mortimer Singer, was tried and convicted by a jury in the United States District Court, Southern District of California, on twenty-nine counts of an indictment charging thirty separate violations of the Mail Fraud Statute, 18 U.S.C. §1341.[1]

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[1] 18 U.S.C. §1341 provides:

"Frauds and swindles

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both . . ."

Counts One to Seventeen of the indictment charged "depositing" of mail in violation of Title 18 U.S.C. §1341, and counts Eighteen to Thirty charged "receiving" mail in violation of the same statute. The first count of the indictment set forth the nature of the alleged scheme and the remaining counts incorporated the details thereof by reference to Count One. The indictment charged that beginning on or about July 1st, 1957 and continuing to on or about March 15th, 1959 appellant devised a scheme to defraud and obtain money and property from amateur song writers, lyric writers and composers by means of false and fraudulent pretenses, representations and promises. The indictment further alleged that appellant falsely represented himself as the operator of a legitimate and well established song servicing and marketing business which could, and did, for a service charge have songs, lyrics and other musical compositions arranged, orchestrated, edited, published, recorded and exploited for the benefit of amateur song writers.

After the indictment was returned appellant attempted to waive a trial by jury, but was unsuccessful because of the government's refusal to consent to such waiver.

This court has jurisdiction of the appeal under provisions of §1291(1), 28 U.S.C.

There are many specifications of error upon which appellant relies. The first is predicated upon the claim that an accused has a constitutional right to waive trial by jury and that to condition the right upon consent of the government is a denial of due process as provided by the Fifth Amendment to the Constitution.

Rule 23 of the Federal Rules of Criminal Procedure provides as follows:

> "(a) Trial by Jury. Cases required to be tried by a jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.
>
> (b) Jury of Less Than Twelve. Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12.
>
> (c) Trial Without a Jury. In a case tried without a jury the court shall make a general finding and shall in addition on request find the facts specially."

Acceptance of appellant's argument necessarily requires a conclusion that the unequivocal language of Rule 23(a) requiring consent of the government before an accused may waive trial by jury is unconstitutional. Although appellant's logic is not lacking some persuasive quality we are of the opinion that constitutionality of Rule 23(a) is well settled.[2] In accordance with the existing authorities we find no denial of due process in this case.

Other specifications of error include charges that government counsel was guilty of prejudical misconduct in his opening statement to the jury, in the course of direct and cross-examination of witnesses and the clos-

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[2]*Taylor v. United States*, 142 F. 2d 808 (9th Cir. 1944), cert. den. 323 U.S. 723, Reh. Den. 323 U.S. 813; *Mason v. United States*, 250 F. 2d 704 (10th Cir. 1957); *Patton v. United States*, 281 U.S. 276, 312.

ing argument. Appellant further contends that the trial judge made improper and prejudicial remarks during the course of the trial, made erroneous and prejudicial rulings in connection with the admission and rejection of evidence, gave erroneous instructions to the jury and failed to give necessary and proper instructions, the absence of which resulted in prejudice to appellant. Numerous examples of alleged misconduct on the part of government counsel have been cited by appellant. A review of the record requires a conclusion by this court that appellant was not the victim of such misconduct as to deprive him of a fair trial.

Many of the appellant's complaints are directed to statements of government counsel and the trial judge which took place outside the presence of the jury and which, had they been known to the jury, would have resulted in prejudice to the government's case, and probable advantage to appellant. In those situations where government counsel may have been guilty of improper examination or argument in the presence of the jury the trial judge carefully admonished the jury in such fashion as to eliminate the possibility of prejudice to appellant.

Appellant contends that the trial judge made improper and prejudicial remarks which resulted in an unfair trial to appellant. Illustrations of such alleged prejudicial action fail to support the conclusion urged by appellant. The record in its entirety discloses consistent concern by the trial judge for preservation of the ap-

pellant's right to a fair trial before the jury. It should be mentioned that even if appellant's contentions were found possessed of some merit, his position at this time would be most tenuous. During the course of trial defense counsel made no objection to allegedly improper or prejudicial remarks of the trial court and allegations of such error were raised for the first time in this appeal. In general, failure to object to statements of the court and thus allow correction of error, if any, at the time precludes consideration of such remark for the first time on appeal.

Appellant charges the trial judge with the commission of error in the admission and rejection of evidence in such fashion as to result in prejudice to appellant. No persuasive examples of such rulings have been cited and we are of the opinion that rulings in regard to the admission and rejection of evidence were, if anything, more consistently favorable to the defense than to the government.

Appellant further alleges error in regard to certain instructions which are said to be prejudicial and misleading. The instructions in question, when considered in their entirety are fair and accurate. Failure of appellant to comply with Rule 30 of the Federal Rules of Criminal Procedure requiring objection to instructions before the jury retires to consider its verdict makes extended discussion of this point unnecessary. *Brown v. United States,* (9th Cir. 1955) 222 F.2d 293 at 298.

Appellant's final criticism of the instructions given is directed to alleged failure by the court to give adequate instructions on the elements of criminal fraud. We are of the opinion that the instructions given in this regard were adequate and accurate. No objection to the instructions, as given, were made as required by Rule 30 and we find no reason, under these circumstances, to consider appellant's argument in further detail.

Appellant's attack upon the sufficiency of the evidence is not predicated upon the record. Testimony and documentary evidence introduced as part of the government's case was more than sufficient to sustain the verdict. We find no error in the order of the District Court denying appellant's motion for a new trial and supplemental motion for a new trial.

Affirmed.

(Endorsed) Opinion Filed Jan. 6, 1964.

Frank H. Schmid, Clerk.

APPENDIX B.

Judgment.

United States Court of Appeals for the Ninth Circuit.

Mortimer Singer, Appellant, vs. United States of America, Appellee. No. 18284.

Appeal from the United States District Court for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered January 6, 1964.

APPENDIX C.

On Petition for Rehearing.

United States Court of Appeals for the Ninth Circuit.

Mortimer Singer Appellant v United States of America Respondent. No. 18,284.

Filed Feb 10 1964

Before: Barnes and Merrill, Circuit Judges, and Burke, District Judge

The petition of appellant Mortimer Singer for rehearing in the above cause is denied.

Stanley N. Barnes
Charles M. Merrill
Circuit Judges

/s/ Floyd H. Burke
District Judge

APPENDIX D.

Constitutional Provisions, Statutes, and Rules Involved.

A. United States Constitutional Provisions.

Amendment 5.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 6.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and case of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment 9.

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment 10.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

B. Federal Rules of Criminal Procedure.

Rule 23. *Trial by Jury or by the Court*

(a) *Trial by Jury.* Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.

(b) *Jury of Less Than Twelve.* Juries shall be of 12 but at any time before verdict the parties may stipulated in writing with the approval of the court that the jury shall consist of any number less than 12.

(c) *Trial without a Jury.* In a case tried without a jury the court shall make a general finding and shall in addition on request find the facts specially.

Rule 30. *Instructions.*

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objec-

tion. Opportunity shall be given to make the objection out of the hearing of the jury.

Rule 52. *Harmless Error and Plain Error.*

(a) *Harmless Error.* Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) *Plain Error.* Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

C. Federal Statute.

18 U. S. C. Section 1341

"Fraud and swindles

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both . . ."

Affidavit of Service of Petition for Writ of Certiorari Pursuant to Rule 33.

State of California, County of Los Angeles—ss.

Viola Figg, being first duly sworn, deposes and says:

That this affiant is a citizen of the United States of America, a resident of the County of Los Angeles, over the age of eighteen years, not a party to the within and above entitled action; that this affiant is making this service for Sidney Dorfman, Esq., who is the attorney for Mortimer Singer, Petitioner in this action; that this affiant is of the firm of Parker & Son, Inc., 241 East Fourth Street, Los Angeles, California, who are the printers and agents in this matter for said attorney, and have their offices at said address in the City of Los Angeles, State of California.

That on the 6th day of March, 1964, affiant served the within Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit on the United States of America, respondent herein, by placing true copies thereof in an envelope, with postage prepaid, addressed to the office address of its attorney of record as follows; Francis C. Whelan and Timothy M. Thornton, United States Attorney for the Southern District of California at Room 600 Federal Building, Los Angeles, California, and by placing true copies thereof in a duly addressed envelope, with *air mail postage prepaid,* to the following address:

Solicitor General,
Department of Justice,
Washington 25, D. C.,

and by then sealing said respective envelopes and depositing the same, with the postage thereon fully prepaid as aforesaid, in the United States Post Office at Los Angeles, California.

That there is delivery service by United States mail at the places so addressed or there is a regular communication by mail between the place of mailing and the places so addressed.

VIOLA FIGG

Subscribed and sworn to before me this 6th day of March, 1964.

MARGARET H. FALES,

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires January 11, 1966.